25 A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Second Appeal No.622 of 2003

Appellant
Plaintiff

Kamal Narayan Saini, s/o Late Beni Ram Saini, r/o Kankali Para, Raipur, Tehsil & District Raipur, C.G.

versus

Respondents
Defendants

1. Smt. Sushil Bai, wd/o Bhagela Saini.
2. Smt. Shanti Bai, wd/o Late Chotelal Saini, d/o Bhagela Saini.

   Both r/o In front of Shitla Mandir, Shitlapara, Raipur, C.G.
3. Punamchand Saini, s/o Late Dularchand Saini, r/o Kankalipara, Raipur, present address Shankar Nagar, Raipur, C.G.
4. Smt. Gulabkali wd/o Late Sugam Saini.
5. Rajesh Saini s/o Late Sugam Saini.

   No.4 and 5 r/o Kankalipara, Raipur, Tehsil & District Raipur, C.G.

SECOND APPEAL UNDER SECTION 100 OF THE CODE OF CIVIL PROCEDURE

Present :
Shri A.K. Prasad, counsel for the appellant/plaintiff.
Shri S.C.Verma, counsel for the respondents/defendants

ORAL JUDGMENT

(Delivered on this 04th day of May, 2007)

The appellant/plaintiff is aggrieved by the judgment and decree dated 18.092003 passed in Civil Appeal No. 22-A of 2002 by the 4th Additional District Judge, Raipur reversing the judgment and decree dated

10.07.2002 passed in Civil Suit No. 17-A of 2001 by the 9th Civil Judge Class-II, Raipur.

2. The appellant/plaintiff instituted a Civil Suit No.17-A of 2001 before the 9th Civil Judge Class-II, Raipur for a declaration of a right to worship in the Shitla Mata Mandir, situated in Purana Basti, Raipur, on the basis of a registered Will executed by Poojari Ram Kishun on 02.07.1980.

3. The respondents/defendants resisted the suit while specifically denying execution of Will by Ram Kishun.

4. For proving the execution of the registered will dated 02.07.1980 by Ram Kishun, the appellant/plaintiff examined the sole surviving attesting witness Radheshyam Agrawal P.W.1 and also adduced the evidence of Dwarka, son of the deceased attesting witness Ghasiram to prove the signatures of Ram Kishun on the Will dated 02.07.1980. It was also urged before the trial Court that Poonamchand D.W.2 had, in his testimony paragraph 8, admitted the signature of Ram Kishun on the document Will Ex.P.1.

5. The learned trial Court decreed the suit in favour of the plaintiff while holding that execution of the Will by Ram Kishun was proved in accordance with law on the following grounds:

a) that the Will was a registered document and was therefore beyond suspicion;
b) that signatures of the testator Ram Kishun on the Will dated 02.07.1980 was not only proved by Dwarka P.W.2

i.e. the son of the deceased attesting witness Ghasiram but also by the admission of Poonamchand D.W.2 in paragraph 8 of the testimony; and

c) the testimony of Radheshyam Agrawal that Poojari Ram Kishun had asked him to sign the document as an attesting witness.

6. Aggrieved by the above mentioned judgment and decree, the defendants preferred Civil Appeal No. 22-A of 2002 before the 4th Additional District Judge, Raipur, which recorded a finding that execution of the Will by Ram Kishun on 02.07.1980 vide Ex.P.1 as required by law was not established since the sole surviving attesting witness Radheshyam had admitted that testator Ram Kishun did not sign in his presence on the Will. Regarding the testimony of Dwarka P.W.2 and the admission made by Poonamchand D.W.2, it was held that it would not satisfy the requirement of law for proving the execution of the Will under Section 63 of the Indian Succession Act as also 68 of the Evidence Act. On these premises, the appeal was allowed.

7. Being aggrieved by the impugned judgment and decree passed in Civil Appeal No. 22-A of 2002, the appellant/plaintiff is before this Court.

8. The following substantial question of law arises for determination in this appeal:

> "Whether the finding of the lower appellate Court that execution of Will by Ram Kishun on 02.07.1980 vide document Ex.P.1 was not proved, is sustainable under law?

9. Shri A. K. Prasad, learned counsel for the appellant/plaintiff placing reliance on ***Ram Rattan (dead) by legal representatives v. Bajrang Lal***

and others **AIR 1978 SC 1393** urged that right to worship by turn is immoveable property and could be bequeathed by a Will. Reliance was placed on ***Meenakshiammal (dead) through LRs. and others vs. Chandrasekaran and another*** **(2005) 1 SCC 280** in support of his contention that once it is established that the Will Ex.P.1 dated 02.07.1980 bears the signatures of the testator i.e. Ram Kishun Poojari, the onus of proving the suspicious circumstances, if any, surrounding the execution of the Will would shift to the defendant. Reliance was placed on ***Chinmoyee Saha v. Debendra Lal Saha*** **AIR 1985 Cal 349**, which was relied on by the Apex Court in the aforesaid judgment. Evidence of Radheshyam Agrawal, Dwarka and Poonamchand was read in *extenso* by the learned counsel for the appellant/plaintiff during the course of arguments.

10. On the other hand, Shri S. C. Verma, learned counsel for the respondents/defendants contended that the appellant/plaintiff has miserably failed to prove execution of the Will, as required by Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. It was argued that the mere fact of proving the signatures of the testator would not by itself prove the execution of the Will since for proving the execution of the Will, it was necessary for the appellant/plaintiff not only to prove that the Will was signed by the testator but also to prove that at the time of execution of Will, he was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and had put his signature out of his own free will and in presence of the witness who attested it in his presence. Learned counsel contended that since the initial burden which lay on the plaintiff had not been discharged in any manner, the first lower appellate Court was wholly justified in allowing the

appeal and recording a finding that execution of Will was not proved in accordance with law. Reliance was placed on ***Bhagat Ram and another v. Suresh and others*** **AIR 2004 SC 436,** ***N. Kamalam (dead) and another v. Ayyaswamy and another*** **AIR 2001 SC 2802** and ***Janki Narayan Bhoir v. Narayan Namdeo Kadam*** **AIR 2003 SC 761.**

11. Having heard learned counsel for the parties, I have perused the record of both the Courts below with utmost circumspection. A Will is defined in Section 2 (h) of the Indian Succession Act, as under:--

> "2 (h): "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death"

Thus, Will is not the mere execution of a document but the legal declaration of intention of the testator with respect to his property, which he desires to be carried into effect after his death. Such intention of the testator has, therefore, to be established by examining at least one attesting witness who saw the testator execute the Will with such intention.

12. Section 63 of the Indian Succession Act, 1925 provides the mode of execution of the Wills reads as under:

> **63. Execution of unprivileged Wills.**--- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:--
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended

thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

13. Therefore, according to this provision, for the due execution of the Will, (i) the testator shall sign and affix his mark to the Will; (ii) signature and mark of the testator shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will; (iii) the Will shall be attested by two or more witnesses; and (iv) each of the said witnesses must have seen the testator sign or affix his mark to the Will and each of them should have signed the Will in the presence of the testator.

14. The attestation of the Will as above is not an empty formality. It means signing a document for the purpose of testifying to the signature of the executant. The attesting witness should put his signature on the Will *animo attestandi.* It may further be noted that according to section-63 of the Indian Succession Act, it is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary.

15. Section 68 of the Evidence Act reads as under:

68. Proof of execution of document required by law to be attested.---If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its

> execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:
>
> Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

16. Since Will is required by law to be attested, execution has to be proved in the manner laid down in Section 68 of the Indian Evidence Act, which requires that at least one attesting witness has to be examined for the purpose of proving execution of such a document. Therefore, if the attesting witness is alive, and is subject to the process of Court and is capable of giving evidence; yet if he is not examined, the Will cannot be used in evidence.

17. Thus, the combined reading of Section 68 of the Indian Evidence Act, 1872 and Section 63 of the Indian Succession Act, 1925 would indicate that a Will to be valid should be attested by two or more witnesses in the manner provided therein and that the propounder thereof should examine at least one attesting witness to prove the Will. The attesting witness should speak not only about the testator's signature or affixing his mark to the Will, but also that each of the witnesses had signed the Will in the presence of the testator.

18. In ***H. Venkatachal Iyengar v. B.N. Thimmajamma and others*** **AIR 1959 SC 443**, it has been laid down that the party propounding a Will or otherwise making a claim under a Will has to discharge the burden to prove its execution in accordance with law. It has been observed that unlike other

documents, the Will speaks from the death of the testator and so when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will.

19. In ***Girja Datt Singh v. Gangotri Datt Singh*** **AIR 1955 SC 346,** it has been laid down that in order to prove the due attestation of the Will, the propounder of the Will has to prove that the two attesting witnesses saw the testator sign the Will and they themselves signed the same in the presence of the testator.

20. In ***Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee since deased and after him his legal representatives and others*** **AIR 1964 SC 529,** it has been observed as below :-

> "The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by S.63, Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the court before the court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no

such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator."

Similar proposition of law has been laid down in ***Smt. Indu Bala Bose and others v. Manindra Chanda Bose and another*** **AIR 1982 SC 133.**

21. In ***Bhagat Ram and another v. Suresh and others*** **AIR 2004 SC 436,** it was held by the Apex Court that the mere fact of registration of a Will would not dispense with the need of proving the execution and attestation of the same, as required by law, to be proved in the manner as provided in Section 68 of the Indian Evidence Act. A plain reading of the proviso to Section 68 of the Indian Evidence Act also leaves no room for any doubt that law does not dispense with the requirement of calling the attesting the witness, if alive, to prove the fact of execution of a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908. The learned trial Court thus clearly fell into error by assuming the genuineness of the Will merely on the basis of its being a registered document.

22. The document Ex.P.1 shows that it is signed by two attesting witnesses - Radheshyam Agrawal and Ghasiram. Ghasiram since dead could not be examined and the remaining attesting witness was examined

before the trial Court by the appellant/plaintiff. Radheshyam Agrawal P.W.1 deposed in paragraph 2 that he could not identify the signatures of Ram Kishun on the Will Ex.P.1. He further admitted in paragraph 2 that the document was already in existence before he was called at the Registrar's Office and no opportunity was given to him to understand the contents of the documents. He also admitted in clear and unambiguous words that the testator Ram Kishun did not sign the Will in his presence and his signatures had already been taken on the document before he was called to attest it. In cross-examination, the testimony of this witness shows that the witness was called to the Sub-Registrar's Office merely to sign as an attesting witness on some document and had absolutely no idea that Ram Kishun intended to execute a Will in favour of Kamal Narayan, the appellant/plaintiff. So far as the testimony of Dwarka P.W.2 i.e. the son of the deceased attesting witness – Ram Kishun is concerned, he admitted in paragraph 2 that he was not present at the time of execution of Will Ex.P.1. The admission of Poonamchand D.W.2 in paragraph 1 of the testimony about the signature of Ram Kishun on Will Ex.P.1 is also of no avail to the appellant/plaintiff because he was not present at the time of execution of Will. In this view of the matter, there is absolutely no room for any doubt that attesting witness Radheshyam Agrawal did not see Ram Kishun signing the document Ex.P.1 i.e. the Will in his presence and had absolutely no idea that Ram Kishun intended to execute a Will in favour of Kamal Narayan relating to bequeathing his right to worship at the Shitla Mata Mandir, Raipur.

23. In ***N. Kamalam (dead) and another v. Ayyaswamy and another*** **AIR 2001 SC 2802,** it was held by the Apex Court that the mere fact that

some witnesses had subscribed the signatures of the testator on the Will, would not satisfy the requirement of law that the attesting witnesses should prove the execution of the Will by the testator. It was held that the signature of the attesting witness on a Will, which required attestation, is requirement of the statute, which cannot be equated with that of the scribe. In the case of ***Chinmoyee Saha v. Debendra Lal Saha*** (supra) which was relied on by the Apex Court in ***Meenakshiammal (dead) through LRs. and others vs. Chandrasekaran and another*** (supra), it was held if the propounder takes a prominent part in the execution of the will, which confers a substantial benefit on him, the propounder is required to remove the doubts by clear and satisfactory evidence. Once the propounder proves that the will was signed by the testator, that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the disposition and put his signature out of his own free will, and that he signed it in presence of the witnesses who attested it in his presence, the onus, which rests on the propounder, is discharged and when allegation of undue influence, fraud or coercion is made by the caveator, the onus is on the caveator to prove the same.

24. In ***Janki Narayan Bhoir v. Narayan Namdeo Kadam*** **AIR 2003 SC 761**, the Apex Court held as under:

> "9. It is thus clear that one of the requirements of due execution of Will is its attestation by two or more witnesses which is mandatory.
>
> 10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to

the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the Will has got to prove that the Will was duly and validly executed. That cannot be done by simply proving that the signature on the Will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a Will in a Court of law by examining at least one attesting witness even though Will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a Will. To put in other words, if one attesting witness can prove execution of the Will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a Will by him and the other attesting witness in order to prove there was due execution of the Will. If the attesting witness examined, besides his attestation does not, in his evidence, satisfy the requirements of attestation of the Will by other witness also it falls short of attestation of Will at least by two witnesses for the simple reason that the execution of the Will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the Will under Section 68 of the Evidence Act fails to prove the due execution of the Will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the Will by the other witness there will be deficiency in

meeting the mandatory requirements of Section 68 of the Evidence Act."

25. Having thus considered the evidence led by the appellant/plaintiff before the lower Court and the submissions of the learned counsel for the parties, I am of the considered opinion that the appellant/plaintiff had miserably failed to prove the execution of Will by Ram Kishun in favour of Kamal Narayan vide Ex.P.1 on 02.07.1980 in accordance with law. In this view of the matter, substantial question of law framed by this Court is answered against the appellant/plaintiff and in favour of the respondents/defendants since the finding recorded by the lower appellate Court that execution of Will by Ram Kishun on 02.07.1980 vide Ex.P.1 was not proved, is impeccable.

26. The appeal being devoid of merit is dismissed. No order as to costs.

Sd/-
Dilip Raosaheb Deshmukh
Judge